Future Ambulette, Inc. *and* Local 1034, International Brotherhood of Teamsters, AFL–CIO.[1] Cases 2–CA–22232, 2–CA–22232–2, and 2–CA–22312–2

May 29, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On January 10, 1992, Administrative Law Judge D. Barry Morris issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Future Ambulette, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] In light of the outcome of this case, we find it unnecessary to pass on the General Counsel's motion to strike R. Exhs. 3 and 4, and the testimony of witnesses Jeannetti and Cunningham.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends, inter alia, that discriminatee Tomas Gaton voluntarily departed from interim employment with the Hertz Corporation. The record demonstrates that unlike his former position with the Respondent, Gaton's job with Hertz required computer skills. Gaton did not possess these skills and he received no computer training from Hertz. Accordingly, we find that the Hertz position was not substantially equivalent employment and that Gaton's abandonment of that job does not constitute a willful loss of earnings.

[4] In enforcing the Board's decision in the underlying case, the court of appeals modified the Board's remedy to limit the circumstances in which discriminatee Howell would be entitled to an award of backpay. In the subsequent compliance proceeding, the judge found that the court's criteria for a backpay award to Howell were satisfied because it was shown that during the period from Howell's discharge to his offer of reinstatement, the Respondent employed other unlicensed drivers. We adopt the judge's determination that Howell is entitled to backpay. We further note that the Board has addressed elsewhere the court's modification of the Board's remedy in this case. See *De Jana Industries*, 305 NLRB 845 (1991).

Larry Singer, Esq., for the General Counsel.
Stuart M. Kirshenbaum, Esq., of Mineola, New York, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. On April 28, 1989, the National Labor Relations Board issued an Order[1] directing Future Ambulette, Inc. (Respondent) to make whole Anthony Williams, Tomas Gaton, Raymond Rodriquez, and Jeffrey Howell (the discriminatees) for their losses resulting from Respondent's unfair labor practices. On June 11, 1990, the United States Court of Appeals for the Second Circuit entered its judgment enforcing the backpay and reinstatement provisions of the Board Order except for a modification with respect to Howell. A controversy having arisen over the amount of backpay due the discriminatees, on October 31, 1990, the Regional Director for Region 2, issued a compliance specification and notice of hearing. Respondent filed its answer to the specification on November 6, 1990.

A hearing was held before me in New York City on February 13–15 and March 4 and 6, 1991. All parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. TOMAS GATON

Efforts to Obtain Employment

Tomas Gaton, who had been employed by Respondent as an ambulette driver prior to his unlawful discharge, credibly testified that he sought interim employment soon after his discharge by contacting business establishments, telephoning prospective employers, contacting the Union, and looking in newspaper classified sections on a daily basis. Gaton estimated that he contacted between 40 to 50 employers, including several ambulette companies, in seeking interim employment. The only interim employment Gaton was able to obtain was as a customer sales representative for Hertz. Gaton was offered reinstatement on December 31, 1988.

II. ANTHONY WILLIAMS

A. *Efforts to Obtain Employment*

Anthony Williams, who also had been employed by Respondent as an ambulette driver prior to his unlawful discharge, credibly testified that he sought interim employment immediately after being discharged by Respondent. His records reflect that he sought employment at nine companies and contacted the Union and the New York City Department of Labor during the 2-month period after his discharge. From May 29 until July 3, 1987, he was employed by American Ambulette Service. He left this position for a higher-paying job at Wildcat in mid-July. In September 1987 Williams was

[1] 293 NLRB 884.

told that there was no longer any work available for him at Wildcat and he almost immediately thereafter obtained employment at the Hertz Corporation. Williams worked at Hertz through early October 1987 until he was laid off due to lack of work. On being laid off from Hertz, Williams once again began his search for interim employment by searching newspaper advertisements. He then began employment with Alamar Carting Corporation. He began working for Kaplan Brothers-Blue Flame Corp. on February 3, 1988, and continued to work there until May 1988. He began employment with Nick Penachio on June 12, 1988. As of the date of the hearing, Williams was employed at Penachio and his interim earnings exceeded the gross backpay alleged in the specification.

B. *Offer of Reinstatement to Williams*

Respondent contends that on October 25, 1988, an offer of reinstatement was sent to Williams by certified mail addressed to 2411 8th Avenue, Apartment 5K, New York, New York 10027. Williams credibly testified that he never received any communication from Respondent or its attorneys offering him reinstatement. Williams testified that he moved to the Bronx soon after his discharge and that he had furnished Respondent with his driver's license which contained his post office box address. Respondent did not introduce into evidence a return receipt to indicate the receipt by Williams of the October 25, 1988 letter.

III. JEFFREY HOWELL

Efforts to Obtain Employment

Jeffrey Howell, who had been employed by Respondent as an ambulette driver prior to his unlawful discharge, credibly testified that he began his efforts to obtain interim employment immediately after his discharge. He sought employment through union referrals, prior employers, newspaper classified advertisements, and at other ambulette companies. Howell was offered reinstatement by Respondent on August 21, 1987.

IV. RAYMOND RODRIGUEZ

A. *Efforts to Obtain Employment*

Raymond Rodriguez, who had also been employed by Respondent as an ambulette driver prior to his unlawful discharge, credibly testified that he began his efforts to obtain interim employment immediately after his discharge. He visited jobsites, asked friends about job availability, sought help from the Union, and searched classified advertisements for interim employment. Rodriguez obtained his initial interim employment at Ben's Auto Parts in late February 1988.[2] He remained employed at Ben's for approximately 3 months until he found a better paying job at A.G.I. Contractors, Inc. In December 1988 Rodriguez relocated to Long Island and began working at D & B Power. He worked at D & B for 2 to 3 months and quit when he found a higher-paying position. In March or April 1989 Rodriguez began working at Academy Broadway, where he worked until September or October 1989 when he was laid off due to the seasonal nature of the business. During the last quarter of 1989 Rodriguez was employed at Midway Ambulette, where he was still employed as of the date of the hearing.

B. *Offer of Reinstatement to Rodriguez*

Respondent contends that on December 30, 1988, it sent a letter to Rodriguez offering him reinstatement. The letter was addressed to Rodriguez at 3204 Holland Avenue, Bronx, New York 10467. Rodriguez credibly testified that he never received the letter. Rodriguez testified that at the time of his discharge he was living at a different address, 1604 Metropolitan Avenue, Bronx, New York. Rodriguez also testified that Charles Dippolito, general manager and secretary-treasurer of Respondent, knew that Rodriguez was not living at the Holland Avenue address because Dippolito had driven Rodriguez home to the Metropolitan Avenue address after having been injured in an accident while still employed by Respondent. In addition, Rodriguez testified that he specifically informed Dippolito of the change of address. The record contains a letter dated January 25, 1988, sent by Dippolito to Rodriguez, addressed to Rodriguez' mother's apartment, located at 660 E. 183d Street, Apartment 2J, Bronx, New York 10453. Respondent did not offer into evidence a return receipt indicating that Rodriguez had received the letter of December 30, 1988.

V. DISCUSSION AND CONCLUSIONS

A. *Efforts to Obtain Employment*

An employer may mitigate his backpay liability by showing that a discriminatee ''willfully incurred'' loss by a ''clearly unjustifiable refusal to take desirable new employment.'' *Phelps Dodge Co. v. NLRB*, 313 U.S. 177, 199–200 (1941). This, however, is an affirmative defense and the burden is on the employer to prove the necessary facts. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813 (5th Cir. 1966); *Sioux Falls Stock Yards*, 236 NLRB 543, 551 (1978); *O.K. Machine & Tool Corp*., 279 NLRB 474, 477 (1986). The record contains evidence demonstrating the efforts made by the discriminatees in attempting to seek employment. I find that Respondent has not sustained its burden of showing that the discriminatees did not ''make reasonable efforts to find interim work.'' *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 575–576 (5th Cir. 1966).

B. *Offers of Reinstatement*

1. Williams

The record contains a copy of a letter dated October 25, 1988, addressed to Williams at 2411 8th Avenue, Apartment 5K, New York, New York 10027. The letter indicates that it was to be sent certified mail. Respondent did not introduce into evidence the green return receipt card. Williams credibly testified that he did not receive the letter, nor any other offer of reinstatement, from Respondent. Joanne Cunningham, the then secretary to Respondent's counsel, testified that when a green card would be returned to the office it would be stapled to the copy of the letter. Helen Jeannetti, the secretary whose initials appear on the October 25 letter to Williams, also testified that when a green card was returned to the office it was the standard procedure to attach it to the copy of

[2] The General Counsel's motion to correct the transcript by substituting the name ''Ben's Auto Parts'' for ''Advance Auto Parts'' is granted.

the letter. Jeannetti did not specifically remember mailing the letter to Williams. Williams testified that his mailing address was a post office box number, which appeared on his driver's license, and which was provided to Respondent.

In *Burnup & Sims*, 256 NLRB 965, 966 (1981), the Board held that where a respondent makes a good-faith effort to communicate a valid offer of reinstatement to the discriminatee, although it does not relieve Respondent of the obligation to reinstate the discriminatee, it does toll Respondent's backpay liability. In that case Respondent's letter was mailed to the only address the discriminatee ever provided to Respondent. The Board pointed out, ''there was no showing that alternative means for communicating with [the discriminatee] were available to Respondent'' (id. at 966).

In the instant proceeding Respondent's counsel's secretary testified that the offer of reinstatement was mailed to Williams by certified mail. Both secretaries also testified that when a green card was received, standard office procedure was to attach it to the copy of the letter. Respondent offered into evidence a copy of the letter to Williams but did not offer the green card. It must be presumed, therefore, that either the green card was not returned, or that when it was returned it did not indicate that Williams received the letter.[3] Under such circumstances, I believe that Respondent was put on notice that the letter was not received by Williams. I note that Williams testified that he provided to Respondent his post office box address. Respondent made no further efforts to communicate with Williams. I find, therefore, that Respondent has not made a good-faith effort to communicate a valid offer of reinstatement to Williams.

2. Rodriguez

The record contains a copy of a letter dated December 30, 1988, addressed to Raymond Rodriguez at 3204 Holland Avenue, Bronx, New York 10467. Rodriguez credibly testified that he never received the letter or any other offer of reinstatement from Respondent. The copy of the December 30 letter indicates that it was to be mailed certified mail. However, Respondent did not offer into evidence the green return receipt card.

Rodriguez testified that at the time of his discharge he was living at another address, 1604 Metropolitan Avenue, Bronx, New York, and that Dippolito was aware of this location because Dippolito had driven him home to this address after Rodriguez had been injured in an accident while he was still employed by Respondent. In addition, on January 25, 1988, Respondent mailed a letter to Rodriguez at his mother's East 183d Street address. This letter was forwarded to Rodriguez by his mother.

As pointed out above, the standard office procedure was to attach the green card to the copy of the letter. Respondent did not offer into evidence the green card. As was the case with Williams, I presume, therefore, that the green card was not returned or did not indicate that Rodriguez received the letter.[4] Under such circumstances, Respondent was put on notice that the letter was not received by Rodriguez. Respondent was aware that Rodriguez had alternate addresses, inasmuch as Dippolito had driven Respondent to an address at 1604 Metropolitan Avenue in the Bronx and Respondent had mailed a letter to Rodriguez at his mother's East 183d Street address. Thus, unlike *Burnup & Sims*, supra, there were alternative means for communicating with Rodriguez, which were available to Respondent. I find, therefore, that Respondent has not made a good-faith effort to communicate a valid offer of reinstatement to Rodriguez.

3. Unlicensed driver status

The United States Court of Appeals for the Second Circuit modified the reinstatement and backpay portion of the Board's Order with respect to Howell. The court ordered (903 F.2d 140, 145 (1990)):

> 4) . . . Howell is entitled to backpay until the earlier of his actual reinstatement, his refusal of reinstatement, or his failure to timely present his driver's license. 5) The backpay obligation of paragraph 4) shall be limited to those periods during which either Future Ambulette employed other unlicensed drivers or Howell himself had a valid license.

Howell was offered reinstatement by Respondent on August 21, 1987. The specification requests backpay for Howell only through the third quarter of 1987.[5] Under the terms of the court order it is necessary to determine whether Respondent employed other unlicensed drivers prior to August 21, 1987, the date of Howell's reinstatement.

In the underlying decision, Administrative Law Judge Morton stated (293 NLRB at 890):

> On the same day Howell was discharged [May 6, 1987], Dippolito asked another driver, Stephen Gurito, for his license. He was unable to produce it. As of the hearing [February and March 1989], Gurito still does not have a valid license and is nonetheless still in Respondent's employ as a driver. For that matter, the driving abstracts of many of Respondent's current drivers disclose that their licenses have been suspended or have expired.

Howell testified that in August 1987 he did not possess a valid driver's license. In addition, Howell testified that other drivers, including Joe Rodriguez, Robert Francis, and ''Julio'' and Jackie Randolph were employed as drivers after August 1987 and that they did not have valid drivers' licenses. This testimony was not controverted.

It would appear that Respondent employed drivers without valid drivers' licenses on May 6, 1987, the date of Howell's discharge, and after August 21, 1987, the date of Howell's reinstatement. The record does not show, however, whether the same situation existed between May 6 and August 21, 1987. The General Counsel subpoened documents from Respondent, including documents relating to the drivers' license

[3] As the Supreme Court noted in *Northern Railway Co. v. Page*, 274 U.S. 65, 74 (1927):

> [T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause.

See also 2 Wigmore, *Evidence*, § 285 (Chadbourne rev. 1979); *Master Security Services*, 270 NLRB 543, 552 (1984).

[4] See *Northern Railway Co. v. Page*, supra, 274 U.S. at 74.

[5] Although App. D–1 of the specification stated that the General Counsel reserved the right to amend the specification with respect to Howell, no amendment was requested.

issue. Respondent refused to comply with the subpoena. Respondent called no witnesses nor produced any evidence to indicate that it employed only drivers with valid licenses during the period May 6 to August 21, 1987.

As stated in *Auto Workers v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972):

> [W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.

See also *Northern Railway Co. v. Page*, supra, 274 U.S. at 74; 2 Wigmore, *Evidence*, § 285, supra.

Respondent employed drivers without valid drivers' licenses until May 6, 1987, and after August 21, 1987. There is no reason to imply that the situation was any different during the period May 6 to August 21. Indeed, as Judge Morton pointed out in the underlying decision, Gurito was unable to produce his driver's license on May 6, 1987, and as of early 1989 he still did not have a valid license (293 NLRB at 890). It can be presumed that he did not have a valid driver's license during the period May 6 to August 21, 1987. In addition, inasmuch as Respondent failed to comply with the subpoena, I infer that the evidence would have shown that during the period May 6 to August 21, Respondent continued to employ drivers without valid drivers' licenses.

Accordingly, I find that during the period May 6 to August 21, 1987, Respondent employed drivers without valid drivers' licenses.

4. Respondent's motion to deny Williams backpay

During the course of the hearing Williams admitted that he worked as a taxi driver during a portion of the backpay period. He testified, without contradiction, that he did not earn a profit during this time because his costs were greater than his income. Williams failed to report this activity to the Board's compliance officer. Respondent has moved that Williams be denied any backpay as a result of this omission.

The Board stated in *American Navigation Co.*, 268 NLRB 426, 428 (1983):

> We find that a remedy which denies backpay for the quarters in which concealed employment occurred will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondents from committing future unfair labor practices. This remedy will be applied, of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings. [Footnotes omitted.]

I deny Respondent's motion. Even if a claimant is found to have fraudulently concealed income, the claimant is only denied backpay for the quarter in which he willfully deceived the Board. Williams credibly testified that his expenses exceeded his income during the time that he worked as a taxi driver. I do not find that Respondent has made the requisite showing that Williams ''willfully deceived the Board.'' See also *Allied Lettercraft Co.*, 280 NLRB 979, 983 (1986).

Conclusions

I find that the backpay computation set forth in the compliance specification, as amended, is appropriate. Inasmuch as I have found that Respondent had not made valid offers of reinstatement to Anthony Williams and Raymond Rodriguez, I recommend that their rights to additional backpay continue beyond the backpay periods covered by this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Future Ambulette, Inc., New York, New York, its officers, agents, successors, and assigns, shall pay to each of the following employees, as net backpay, the amounts set forth opposite each name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[7] less tax withholdings required by Federal and state laws:

Anthony Williams	$12,926
Tomas Gaton	25,812
Raymond Rodriguez	[8]34,550
Jeffrey Howell	5,925

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] See generally *Isis Plumbing Co.*, 138 NLRB 716, 717–721 (1962).

[8] The amended backpay amount is reflected on App. 1 to General Counsel's brief.